No. 83-610

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BABBITT FORD, INC., an Arizona corporation,

Petitioner,

vs.

THE NAVAJO INDIAN TRIBE, through its Chairman, PETERSON ZAH; THE NAVAJO TRIBAL COURTS, through its Chief Justice, NELSON J. McCABE; THE NAVAJO TRIBAL POLICE, through its Superintendent, WILBUR KELLOGG; TOM SELLERS and LORRAINE SELLERS, husband and wife; BARNEY JOE and ALICE JOE, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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*Pursuant to Supreme Court Rule 28.1 we avow to the Court that Petitioner Babbitt Ford, Inc., neither possesses nor is a part of any other parent company, subsidiary, or affiliated corporation or other entity.

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PETITIONER'S REPLY MEMORANDUM

Because the secured sales contract, through which the reservation Indian voluntarily grants to Babbitt Ford the contractual right to effect peaceful, self-help repossession upon default, is executed and performed outside of the Navajo Indian Reservation, the issue in this case is not, as Respondents would have it, whether or not the Navajo tribe can "regulate" on-reservation commercial activities of non-Indians. Rather, the issue is whether the Navajo Tribe can unilaterally alter or contradict the rights granted through off-reservation commercial transactions between individual Indians and non-Indians so as to penalize the non-Indian party who does no more than exercise his contractual rights while, at the same time, rewarding the defaulting Indian purchaser for his contractual breach.

Notwithstanding Respondents' claims to the contrary, by holding that the Navajo Tribe possesses the inherent, sovereign power to restrict Babbitt Ford's contractual right to effect a peaceful, self-help repossession, the Ninth Circuit's decision here squarely conflicts with the Arizona Court of Appeal's decision in *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d. 689 (App., 1977) which held that:

> The parties have by their contract made a choice of law covering the transaction. First, by granting to seller [Babbitt Ford] all rights granted by the Arizona Uniform Commercial Code, including the right to self help in repossession upon default, and second, by specifically stating that the contract would be interpreted and enforced under Arizona law.
>
> *By doing so, the parties have by contract excluded the possibility that this contract would be affected by the provisions of the Navajo Tribal Court.* Applying the agreement of the parties to this transaction, *it is clear that Babbitt had the right under Arizona law to do exactly what it did in repossessing the pickup without liability.* 571 P.2d. at 696, emphasis added.

Moreover, Respondents' attempts to distinguish the other cases discussed in the Petition (pp. 9-13) fails to recognize the fundamental conflict of principle, analysis, and application of prior decisions of this Court which has led to decisions at odds with the Ninth Circuit's holding here. While the decisions discussed in the Petition, especially *Little Horn State Bank v. Stops*, 555 P.2d. 211 (Mont., 1976), *cert. denied*, 431 U.S. 924 (1977), *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 287 N.W.2d. 377 (Minn., 1979) and *American Indian Agricultural Credit Consortium, Inc. v. Fredericks*, 551 F.Supp. 1020 (D.Colo., 1982), hold that tribal law and tribal self-government cannot affect the construction, application and enforcement of private, off-reservation contracts between individual Indians and non-Indians even if enforcement of the contract's terms occurs on the reservation, the Ninth Circuit here reaches a contrary result. While the cases discussed in the Petition recognize that individual Indians cannot interpose their special status as Indians to shield them from the full measure of their off-reservation contractual obligations, the Ninth Circuit here holds that individual Indians can indeed retreat into a reservation sanctuary where they may violate the terms of their off-reservation contract and interpose their so-called special status to immunize them from the contractually specified, remedial consequences of their breach.

Indeed, Respondents themselves recognize that the reasoning of the cases discussed in the Petition "has been rejected by other Courts which have considered similar situations." (Respondents' Brief in Opposition, p. 10.) Respondents thus concede that confusion and conflict in the application of this Court's decision to this issue has existed for over a decade among federal and state appellate and trial courts. Only this Court can resolve this decisional stalemate.

Respondents' assertion that the decision of the Court below is well grounded in the decisions of this Court is simply erroneous. By asserting that the tribal laws at issue here are "reasonable means to protect the health and welfare of the Navajo

people and all those subject to its jurisdiction," (Respondents' Brief in Opposition, p. 5), Respondents, like the Court below, set up an analytical premise at odds with *Montana v. United States*, 450 U.S. 544 (1981) which requires a showing of necessity, not mere rationality, in order to subject non-Indians to tribal civil authority:

> * * * But [the] exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. 450 U.S. at 564, emphasis added.

The undisputed fact, that the repossessions here at issue were effected peacefully, coupled with the fact that Babbitt Ford could not lawfully repossess a vehicle under the terms of the purchase contract and applicable Arizona law if it engaged in or created the occasion for reservation violence, render the tribal laws at issue here unnecessary to protect the peace, health and welfare of the tribe. Indeed, the severe and cumulative penalties imposed under federal and state law upon a secured party, like Babbitt Ford, for effecting a self-help repossession violently or in breach of the peace provide adequate deterrences against violence or the occasion of violence. As summarized by one leading commentator, at least four (4) categories of cumulative sanctions and penalties could be imposed under federal and state law for a self-help repossession effected in breach of the peace. These are: (1) criminal liability under the Federal Consumer Credit Protection Act since "if the debt collector threatens violence, he may still be guilty of an extortionate collection practice" under 18 U.S.C. §§891-896; (2) tort liability for compensatory and punitive damages for assault, battery, conversion, or intentional infliction of emotional distress; (3) statutory liability under A.R.S. §44-3153 [U.C.C. §9-507] "for improper repossession" in addition to common law, tort damages in a minimum amount of "not less than the

credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price," A.R.S. §44-3153(A); and (4) the complete loss of the secured party's right to a deficiency judgment against the debtor, a sanction which one commentator has called "potentially [the] most significant consequence of a creditor's misbehavior." White and Summers, *Uniform Commercial Code*, 2d. Ed., §26-12, §26-13, §26-14, §26-15 pp. 1123-1135 (1980) [quoting *passim*]; *Cf. Day v. Schenectady Discount Corporation*, 125 Ariz. 564, 611 P.2d. 568 (App., 1980).

In view of these contractually and legally mandated deterrences against violence or its near occasion in effecting self-help repossessions, the tribal laws at issue here, which apply without regard to any showing of a potential for breach of the peace, merely impose unilateral burdens and modifications on the lawful exercise of off-reservation, contractual rights even as they are in no way "necessary" or "essential" to protect tribal self-government. The decision in *Brown v. Babbitt Ford, Inc., supra*, makes it clear that the right to self-help repossession under the circumstances of this case is a valuable, contractual right. Holding that *"the most important remedy available to the secured creditor is the right to take possession of the collateral following the debtor's default,"* the Arizona appellate courts have repeatedly held that *"[i]t is well settled that a secured creditor, upon default of the debtor, has the immediate right to possession of the collateral" because "upon a debtor's default, title and right of possession pass to the creditor,* and the creditor may repossess the property by self-help" as a matter of contractual right. *City Corp Homeowners, Inc. v. Western Surety Company*, 131 Ariz. 334, 336, 641 P.2d 248, 250 (App., 1982) citing *American National Bank & Trust Company v. Robertson*, 384 So.2d. 1122, 1123 (Ala.Civ.App., 1980); *Brown v. Babbitt Ford, Inc., supra*, 117 Ariz. at 199.

By effectively eliminating or, at least, substantially curtailing, Babbitt Ford's right to immediate repossession of the secured property upon the Indian debtor's contractual default,

7 N.T.C. §607 and §609 unilaterally impair the most important contractual right available to Babbitt Ford and thus infringes the personal liberties guaranteed to Babbitt by the Bill of Rights. The ambit of personal liberties protected by the Bill of Rights includes the liberty to make a lawful, binding and enforceable contract. Although the liberty to make legal contracts is not absolute, it is at least clear, as one Court put it, that interference by one state with the "right to contract within another state concerning property within the state, is a denial of due process," especially where, as here, the evils sought to be remedied "would be prevented adequately under the existing . . . legislative provisions" of the state in which the contract is made. In circumstances analogous to those here present, this Court has held that one state cannot directly or indirectly interpose its powers between a corporation transacting business in another state and the corporation's creditors so as to "forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance" even though the corporation owned property and did business in the state making the attempted, extraconstitutional regulation. *New York, L.E. & W. R. Co., v. Commonwealth of Pennsylvania*, 153 U.S. 628, 646-647 (1894); *Fidelity & Deposit Company of Maryland v. Tafoya*, 270 U.S. 426, 434-435 (1926); *Department of Financial Institutions v. General Finance Corporation*, 86 N.E.2d. 444, 449 (Ind., 1949) quoting *Algeyer v. Louisiana*, 165 U.S. 578, 591-592 (1897). The rule of these cases is summarized in 16A *C.J.S.* "Constitutional Law" §575 as follows:

> The right to make legal contracts of all kinds, without fraud or deception, is not only a part of the civil liberties possessed by every individual who is sui juris, but is both a liberty and a property right within the protection of the guarantees against the taking of liberty or property without due process of law. p. 607, (citations and footnotes omitted.)

> The due process clause of the Fourteenth Amendment denies to any state the power to restrict or control the obligation of contracts executed and to be performed outside the state, notwithstanding one of the contracting parties and subject matter of the contract may be within the state. pp. 609-610, (citations and footnotes omitted.)

The Court has recently recognized that contractual rights and remedies may be impermissibly infringed by laws which repudiate express promises so as to affect detrimentally "the value of a security provision" without replacing it "by an arguably comparable security provision." The Navajo tribal laws at issue here destroy the security provisions of the contract without replacing them with security provisions of equal value and merely increase the cost of contract enforcement while giving the debtor additional time to remove or otherwise sequester the property from its lawful possessor. *United States Trust Company v. New Jersey*, 431 U.S. 1, 19, 26-27, note 26 (1977). Both the holding and the language of *W.B. Worthen Company v. Kavanaugh*, 295 U.S. 56 (1934) are thus applicable here:

> • • • Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason in a spirit of oppression. • • • With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor. 295 U.S. at 60.
>
> Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar. • • • 295 U.S. at 60-61.
>
> • • • The changes of remedy . . . are seen to be an oppressive and unnecessary destruction of nearly all the inci-

dents that give attractiveness and value to collateral security. 295 U.S. at 61-62.

Thus, both the extraconstitutional structure of the Navajo Tribal Courts outlined in the Petition (pp. 22-26) but not denied by Respondents, and the substantive features of the subject tribal laws as applied to the contracts here at issue, create unwarranted intrusions into the personal liberties and property rights of Babbitt Ford. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) teaches that such intrusions into Babbitt Ford's rights and liberties cannot be accomplished by an Indian tribe through the exercise of its retained sovereignty; and contrary to Respondents' contentions to the contrary, the Court expressly extended the *Oliphant* rule in the *Montana* case to civil matters like this case. 450 U.S. at 565.

Respondents' position, like the decision of the Court below, simply ignores the long line of cases in which the Court had held that "Indians going beyond reservation boundaries have generally been held subject to the same nondiscriminatory state laws otherwise applicable to all citizens" which apply on the reservation where, as here, the object of their application is "no mere local matter." These cases further hold that individual Indians must abide by the duties and bear the burdens of their commercial dealings and property ownership and cannot enjoy only the privileges thereof by virtue of their status as Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149, 154-155 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Shaw v. Gibson-Zahniser Oil Corporation*, 276 U.S. 575, 580-581 (1928); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 607-610 (1943); *Choteau v. Burnett*, 283 U.S. 691 (1931); *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936); *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Ward v. Race Horse*, 163 U.S. 504, 514-515 (1896); *Rice v. Rehner*, U.S. , 103 S.Ct. 3291 (1983).

Contrary to Respondents' suggestion, there is nothing wrong, constitutionally or otherwise, with the contractual right of self-help repossession, and the fact that two states and some commentators dislike this remedy does not detract from its legality in Arizona and forty-seven (47) other states and does not constitute sufficient reason to free individual Indians from their voluntarily assumed obligations in off-reservation, contractual dealings. Respondents' attempt to attack collaterally the provisions of A.R.S. §44-3149 [U.C.C. §9-503] and to repeal both it and sales contract which expressly incorporate it throughout a sizeable portion of the States of Arizona and New Mexico fails to heed the admonition of the *Oliphant* decision, that Indian tribes are not states of the union and, being within the geographical limits of the United States, exist in subordination to the federal and state governments.[1] *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 211.

Nor does this case resemble *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) or the various licensing, taxation and zoning cases cited by Respondents' Brief in Opposition (pp. 7-8). Unlike the non-Indian parties in those cases, Babbitt Ford does not voluntarily carry on any business on the reservation, does not benefit from tribal police protection or other governmental services, and does nothing which would justifiably require it to submit to tribal government. Significantly, while a

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[1] "Clearly there is nothing unconscionable in a contract clause authorizing the repossession of chattel on default" since Article 9-503 of the U.C.C. "specifically authorize[s] such self-help remedies upon the condition that they be carried out without breach of the peace." *Nevada National Bank v. Huff,* 582 P.2d. 364, 369 (Nev., 1978). Moreover, the self-help repossession provisions of U.S.C. §9-503, A.R.S. §§44-3149, have been regularly upheld against challenges to their constitutionality. As one Court put it, "[t]he United States Supreme Court has declined to grant certiorari to review four different appeals in which the constitutionality of self-help repossessions has been upheld," and "at least thirty [30] appellate courts that had the opportunity to consider the issue have upheld the constitutionality of self-help repossessions." *Helfinstine v. Martin,* 561 P.2d. 951, 955 (Okl., 1977) and cases cited.

non-Indian in the taxing and licensing cases may avoid paying the tax or obtaining the license by voluntarily choosing not to deal with the tribe or on the reservation, Babbitt Ford is compelled either to submit to tribal law and tribal court jurisdiction through its mere entry onto the reservation or to abandon both its possessory rights in the vehicle and its contractual right to peacefully retake possession of the chattel upon the Indian purchasers' default. Unlike the non-Indian parties in the licensing and taxation cases, Babbitt Ford's presence on the reservation and its subjection to tribal law is compelled by the Indian purchasers' default.

Respondents simply ignore the fact that the only consensual features of the transaction here at issue take place off of the reservation, and expressly authorize self-help repossession. Where, as here, the Indian purchaser is clearly in default, the secured creditor, Babbitt Ford, is entitled to immediate possession of the collateral, and the refusal to surrender the collateral is both a conversion of the chattel and a breach of the contract. *Production Credit Association v. Nowatzki*, 280 N.W.2d. 118, 121-123 (Wis., 1979). As such, the tribal laws at issue here, 7 N.T.C. §607 and §609, accomplish the remarkable feat of rewarding a tortfeasor who is in breach of contract while punishing a secured creditor who peacefully exercises his contractual right to immediate repossession of the secured vehicle.

Contrary to Respondents contentions, the cases in which this Court has previously scrutinized the 1868 Navajo Treaty, 15 Stat. 667-668, have all involved circumstances strictly confined within the boundaries of the Navajo reservation. None of those cases cited in Respondents' Brief in Opposition (pp. 10-11) deals with a situation involving off-reservation commercial transactions which entail on-reservation contractual enforcement. The Court's careful proviso in *McClannahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) applies to all such cases and distinguishes them all from this case: "We are not dealing with Indians who have left the reservation" but with the "narrow question" of activities "exclusively on the reservation." 411 U.S. at 167-168.

Conversely, in *Utah & Northern Railway Company v. Fisher*, 116 U.S. 28 (1885) and *Ward v. Race Horse*, 163 U.S.

504 (1896) the Court construed provisions of the 1868 Bannock Treaty which are identical to the articles of the 1868 Navajo Treaty at issue here to hold that Indians residing on the reservation were subject to state laws for their off-reservation activities. "To suppose that the words of the treaty intended to give the Indian the right to enter into already established states . . . and there exercise the right to hunting, in violation of the municipal law, would be to presume that the treaty was drawn so as to frustrate the very object it had in view," the Court held in *Ward*, 163 U.S. at 508-509, while in *Fisher* the Court held that under such treaty provisions the "process of its [the state's] courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance." 116 U.S. at 31. Together with the material set forth in the Petition (pp. 26-29), these cases support Babbitt Ford's contention that these treaties contemplate the application of state law in cases such as the instant one.

In this case Babbitt Ford did nothing more than repossess peacefully motor vehicles which it was contractually and legally entitled to possess. Babbitt Ford never employed force, stealth or deceit and never engaged in any sharp collection practices even as the tribal laws here at issue seek to render Babbitt Ford's contractual right of possession a sharp and deceitful collection practice *per se*.

We submit that 7 N.T.C. §607 and §609 as applied to Babbitt Ford here do not fall within the scope of the Navajo Indian Tribe's retained sovereignty. We are quite confident that we have not over estimated the ramifications of the Ninth Circuit's decision here. Such ramifications, together with the Ninth Circuit's radical departure from the Court's precedent and the conflicting approaches to the resolution of this issue by federal and state courts, warrant review of the judgment and opinion of the Court below. We thus submit that certiorari should be granted.

Respectfully Submitted

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